Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2018-09-07
Case No.: 2015-15

Between:

Correctional Service of Canada, Appellant

and

Sandrina Courtepatte, Respondent

Indexed as: *Correctional Service of Canada v. Courtepatte*

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* of a direction issued by an official delegated by the Minister of Labour.
Decision:	The direction is confirmed.
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	English
For the appellant:	Mr. Pierre Marc Champagne, Counsel, Department of Justice, Labour and Employment Law Group
For the respondent(s):	Ms. Charlie Arsenault-Jacques, Union Advisor, UCCO-SACC-CSN
Citation:	2018 OHSTC 9

REASONS

[1] This concerns an appeal brought by Correctional Service of Canada under subsection 146(1) of the *Canada Labour Code* (the *Code*) against a direction issued on June 17, 2015, by official delegated by the Minister of Labour (ministerial delegate) Kim Beattie upon completing an investigation into the work refusal registered by the respondent on May 26, 2015, and concluding that a condition existed in the work place that constituted a danger to employees while at work. That condition is described in the direction appealed, which reads as follows:

> In the Matter of the *Canada Labour Code*
> *Part II* – Occupational Health and Safety
>
> DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(a)
>
> On June 5, 2015 the undersigned Official Delegated by the Minister of Labour conducted an investigation following a refusal to work made by Sandrina Courtepatte in the workplace operated by Correctional Service of Canada being an employer subject to the Canada Labour Code Part II, at 21611 Meridian Street, Edmonton Alberta, T5Y6E7, the said workplace being sometimes known as CSC Edmonton Institution.
>
> The said Official Delegated by the Minister of Labour considers that a condition in the workplace constitutes a danger to employees while at work:
>
> *Control post EM-14 is not staffed between the hours of 07:00 and 16:00 hrs Monday to Friday and therefore a rapid armed emergency response is not provided for the protection of employees who may be located in areas identified as "blind spots" in the courtyard area.*
>
> Therefore, you are hereby directed, pursuant to paragraph 145(2)(a) of the Canada Labour Code Part II to take measures to provide an equivalent level of protection to employees in all areas of the court yard, no later than June 17th, 2015.
>
> Issued at Edmonton this 17th day of June, 2015
>
> [signature]
>
> Kim Beattie
>
> [Emphasis added]

[2] The work place where the respondent initiated her work refusal is the Edmonton Institution (Institution), which is a maximum security establishment managed by the appellant. The area of the Institution that is central to the refusal and this appeal is referred to throughout as the "inner courtyard".

Background

[3] The investigation report of Ministerial Delegate Beattie having been filed as an exhibit, the evidence presented at the hearing as well as an exhaustive site visit executed by the undersigned have served to establish the following situational facts and background. The site visit in particular has been of great assistance to the undersigned in reaching the decision that follows. The population of the Institution is divided into a number of ranges that encompass inmate living units. The main building comprises eight living units, referred to as A/B, C/D, E/F and G/H, each hosting up to 24 inmates single-bunked or 48 inmates double-bunked, plus a 48-bed segregation unit. The Institution has a number of different courtyards on its grounds, including one inner courtyard giving access to a number of doors or entrances to the main building. Four of those doors provide access to or exit from the units previously mentioned, and two additional doors provide staff and inmates access to or exit from program or service areas. The four doors giving access to or exit from the different units are under supervision of their respective sub-control posts, while the two doors allowing access to or exit from the program and service areas are controlled by major control posts designated as 2 Control and 3 Control. The courtyard also gives access to two breezeways, one located next to A/B units giving access to Unit 5 and the other, located between E/F units, giving access to the garbage disposal area. The inner courtyard has a number of sidewalks. A major sidewalk runs along the walls of the Institution, connecting 2 Control, A/B units, C/D units, 3 Control, E/F units and G/H units. That sidewalk is covered by an overhang. Other sidewalks include stairs and cut through the courtyard. They are not covered by an overhang.

[4] While inmates transiting through either 2 Control or 3 Control before they enter from or to the inner courtyard are searched or patted down, inmates leaving their units to the inner courtyard through individual sub-controls are not searched or patted down before they enter said inner courtyard. It bears noting at this time that there are no organized or standard inmate activities occurring in the said inner courtyard which essentially serves as a thoroughfare or movement corridor for the circulation of inmates between living units and the front of the Institution (2 Control) or the back of the Institution (3 Control). Staff also circulate through the courtyard for various purposes. During the day, there is limited inmate movement through that corridor and although staff are not usually present there at the same time as inmates, there are times when they are. All doors as well as the inner courtyard are under surveillance of the Main Communication and Control Post (MCCP) of the Institution which is equipped with a variety of screens linked to multiple cameras monitoring all areas of the Institution and is staffed by a correctional officer at all times. The site visit made it possible for the undersigned to be informed that the MCCP officer is in charge of monitoring the perimeters of the Institution as well as the various internal alarm systems, such as fire alarms, personal portable alarms (PPA) carried or worn by correctional officers as well as other alarms and equipment. There are more than 175 camera feeds at MCCP out of which the MCCP officer decides which ones will be displayed on the multiple screens of the post. Usually, 37 feeds are displayed simultaneously from different cameras, some fixed and some remotely controlled. Relative to the time span central to the present case, that is weekdays between 07:00 and 16:00, MCCP plays a central role in the movement of inmates. As such, it coordinates between the living units' sub-controls and the major control posts. MCCP is thus in charge of calling staff to 2 or 3 Control to receive and search inmates in movement. Once sufficient staff are present, MCCP confirms readiness for movement, EM-14 (when manned) and EM-22, having direct observation of the courtyard, then confirm that it is clear and MCCP asks if the unit sub-control

is ready to release inmates. Upon such confirmation, the inmates are released into the courtyard and have five minutes to travel through to their destination. The unit sub-control then confirms that the inmates have been let out (when movement initiates from the sub-control units) and when the movement is over, EM-14 and EM-22 once again confirm that the courtyard is clear. During the site visit, it was also put to the undersigned that MCCP is not always informed of the number of inmates being released by a unit sub-control. It also became evident through that visit that the task of MCCP officer is a demanding task where one considers that one needs to pay attention to a total of 37 feeds, alternate those to monitor in some fashion all 175 camera feeds while at the same time having to complete a number of what could be called clerical functions.

[5] There are three armed posts from which the inner courtyard can be observed, and all three were visited by the undersigned. Two of those armed posts are located respectively at each extremity of the inner courtyard, either above 2 Control or above 3 Control. Those armed posts are referred to as EM-14 and EM-22. The first one, EM-14, is situated at the west extremity of the inner courtyard and above 2 Control which is at ground level. Catwalks or galleries as well as gun ports accessible by EM-14 allow for observation of inmates and provide an armed response to the inner courtyard, the gym and the sweat lodge area. The second one, EM-22, is situated at the east extremity of the inner courtyard and above 3 Control, which is at ground level. It is not however situated straight above said 3 Control, but approximately 20 meters east of such. The two elevated armed posts, EM-14 and EM-22, situated in diagonally opposite directions, have outside views of the inner courtyard and also have respective galleries allowing a view of some specific sectors inside the Institution. Galleries of EM-22 allow monitoring activities in what is referred to as the Corcan shop, which is not currently in use, and thus EM-22 serves mostly for observation and armed response to the inner courtyard. The third armed post, 3 Control, adjacent to the 3 Control door and thus at ground level, is equipped with windows, screens and a convex mirror allowing the monitoring of activities in the inner courtyard, as well as a gun port on the courtyard side usable for an armed response, if needed. The site visit allowed the undersigned to see that with only EM-22 manned, an armed response can only cover part of the courtyard, this being put at between 60 and 70% by respondent witnesses, taking into account the blind spots identified previously as well as the limited sight lines offered by the gun port at EM-22. That same visit, during which the undersigned viewed all three armed posts (EM-14 and EM-22 as well as 3 Control) and was given a sighting and firing demonstration using a replica of the C-8 rifle, which is the firearm available to officers, also served to demonstrate a number of additional elements. First, with the manning of both EM-22 and EM-14, the firearm coverage of the courtyard extends to approximately 95%, with the remaining 5% comprising a small area in the corner between C/D unit and 3 Control. Second, officers present on post at EM-22 and EM-14 are visible from the courtyard as the windows of those posts are not made of one-way glass, adding to the deterrence effect of officer presence. Third, while there is an added armed post at ground level, adjacent to 3 Control, and while the manning officer could take a shot in case of an emergency, the make-up or construction of the actual gun port, which is recessed behind glass, necessitating first that the glass be broken prior to the shot being taken, restricts the lateral movement of the firearm in the port hole, thus limiting considerably the possible arc of fire from said port hole, by possibly between 7 and 10 meters, and consequently the capacity for 3 Control to cover the blind spots or rather EM-22. It is important to repeat here that all this information was provided to the undersigned during the extensive site visit that occurred in the presence of both parties.

[6] Dealing more specifically with the facts of the present case, evidence was provided that armed post EM-14 has historically not been manned when the Institution's gymnasium is not in use. That particular part of the Institution is normally in use and available to inmates (recreation) only during evening shifts on weekdays, that is after 16:00, or on weekends. During those times or shifts, EM-14 is always manned, as its gallery overlooks the gymnasium. Typically, there is no recreation during the day. However, for a certain period of time prior to this work refusal, where construction was going on at the Institution and recreation could not occur in the mini yards, budgetary allocation of interim funding made it possible to conduct recreation during the day, and thus use the gymnasium at those times. EM-14 and EM-22 were then manned when recreation was occurring, to wit between 07:00 and 16:00, Monday to Friday, although the inner courtyard itself, while it did not serve for recreation at that time, was thus under supervision of EM-14. It would appear that this situation started some time in 2011 and lasted until 2012 when the Institution returned to its usual recreation pattern or schedule and EM-14 ceased being manned outside regular gym periods. A first employee work refusal at that time and a direction that a Joint Hazard Analysis (JHA) be conducted caused the manning of EM-14 during the day shift to continue nonetheless. With this process completed to the satisfaction of a health and safety officer, the manning of EM-14 was returned to recreation use only (evenings and weekends) on or around May 26, 2015, and that information was transmitted to Institution officers on May 26, 2015, at the morning briefing meeting. On that same day, respondent Correctional Officer Courtepatte filed her work refusal. That action was immediately followed by a first meeting and then a management investigation involving correctional managers, some correctional officers including the respondent, representatives of the respondent's union (UCCO-SACC) as well as representatives from senior management. As the matter could not be resolved, a joint committee investigation was conducted by an employer representative (Sharon Otto) and an employee representative (Joseph Hart), who could not arrive at a common conclusion, resulting in two separate reports with differing conclusions being issued. This is what led to an on-site investigation by Ministerial Delegate Beattie on June 15, 2015, and the delivery of a complete investigation report on January 18, 2016. However, prior to said final report being delivered, Ministerial Delegate Beattie advised the appellant on June 17, 2015, that in the former's opinion, there existed a condition in the work place that constituted a danger to employees while at work. That condition is expressed at length in paragraph 1 above. As a result, Ministerial Delegate Beattie issued to the employer the direction that is central to the present appeal. The end result of all this is thus that EM-14, save possibly for very brief periods of some days, has been manned practically continuously since 2011 with the Courtepatte refusal seeking as its ultimate purpose that such manning be maintained.

Issue

[7] As this appeal has been brought by the appellant employer against a direction that found a condition to exist in the work place that constituted a danger to employee(s) while at work, the issue to be determined at appeal could simply be stated as whether ground(s) existed for the issuance of said direction at the time it was issued. In my opinion, however, the issue needs to be formulated more clearly. Under subsection 128(1) of the *Code*, the right to refuse to work that is granted to employees to whom the *Code* applies is couched in terms of whether an employee at work has reasonable cause to believe that a danger is present, whether that takes the form of the use or operation of a machine or thing, a condition in the

work place (as in the present case) or the performance of an activity. In seeking to answer this question, one needs, therefore, to base one's consideration on the definition of "danger" provided in the *Code*, which states that "danger" “means any hazard, condition or activity that could reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it before the hazard or condition can be corrected or the activity altered.” Noteworthy as regards this definition is the central notion of reasonable expectation. In the present case, therefore, where the factual situation has to do with a condition in the work place, to wit the manning, or to be more precise, the non-manning of armed post EM-14 between the hours of 07:00 and 16:00, Monday to Friday, at maximum security Edmonton Institution, answering the question posed by the said refusal to work will require to thus consider whether when she refused to work, respondent Courtepatte had reasonable cause to believe that the non-manning of EM-14 could reasonably be expected to represent an imminent or serious threat to her life or health before the occurrence of corrective action. Given the wording of subsection 128(2) of the *Code*, an affirmative answer to this first question would raise the second issue of whether such "danger" can be seen as a normal condition of employment. At this juncture, I need to repeat here what was told to the parties on the occasion of the preparatory conference to the hearing and has long been established at case law, to wit that the hearing giving rise to the following decision as well as, consequently, the decision itself represent a *de novo* process through which the matter raised by the initial refusal to work is considered anew and thus, the decision to be arrived at on the balance of probabilities will be on the basis of the evidence received at the hearing, which will normally include the information collected by the ministerial delegate, as per the investigation report filed as an exhibit, ultimately confirming, varying or rescinding the conclusion previously arrived at by said ministerial delegate.

Submissions of the Parties

A) Appellant’s Submissions

[8] Quite apart from the consideration of the issue(s) from the standpoint of the applicable law and jurisprudence, the appellant has argued that Ministerial Delegate Beattie's conclusion was based partly on facts that were erroneous and were contradicted by the evidence heard at appeal. In this respect, the appellant submits as purely erroneous Ministerial Delegate Beattie's finding that post EM-14 had stopped being manned because the post was no longer funded and that while taking that decision, management had failed to adjust its response protocol. Rather, the appellant submits that the evidence has clearly established that the staffing of EM-14 had never been meant to provide an immediate armed response during movement of inmates in the inner courtyard, and instead had been meant to provide surveillance of the gymnasium when open. As such, when the staffing of that post between 07:00 and 16:00, Monday to Friday, went back to the previous schedule on May 26, 2015, it was solely because the gymnasium would thereon be again available to inmates between those hours. As well, the stated belief that inmates would quickly gain awareness of the absence of available immediate armed response in certain areas of the inner courtyard and thus could modify their behaviour in these areas is not supported by the evidence that no major assaults have ever taken place in the inner courtyard in all the years that EM-14 has not been staffed, with exception of the one incident of February 14, 2011, that was rapidly controlled by correctional officers on duty.

[9] The appellant also describes as "misleading" the "pool and lifeguards" analogy drawn by Ministerial Delegate Beattie relative to usage of the inner courtyard. According to the appellant, the inner courtyard's real usage is for the movement of inmates. Where the analogy to "lifeguards" as being the "immediate firearm response capability from guards in various control posts" would suggest that the armed posts officers are the only persons monitoring movement in the courtyard, the appellant submits that the evidence has clearly established that inmate movement is tightly coordinated between multiple officers through a variety of communication devices, with all movements under close scrutiny of the officer always manning the MCCP position. Given this, the appellant considers as erroneous Ministerial Delegate Beattie's conclusion that removal of the EM-14 officer leaves some areas of the inner courtyard without surveillance. Along the same line, the appellant sees also as erroneous the suggestion that non-manning of EM-14 delays by 3-5 minutes a rescue attempt in the courtyard, since this ignores the fact that any emergency response would not start with an immediate armed response, but rather with the other officers on the ground equipped with their usual tools. It is the appellant's submission that such 3-5 minutes time frame solely relates to the time needed to man the EM-14 post if deemed necessary, and not to the time needed for usual response procedures to unfold. The appellant also questions the adequacy of the "pool" allegory with regard to the unrestricted ability to intervene anywhere. The appellant submits that such allegory does not reflect the reality of a normal situation in the inner courtyard, as it is not used for anything but inmate movements from points A to B that are strictly monitored and orchestrated, with clearances communicated through the general radio system. It is not accurate to suggest that inmates can go wherever they want during a movement. According to the appellant, the evidence has clearly shown that if inmates happen to go in the direction of the overhang located under armed post EM-22 or decide to stay there or gather with other inmates, nothing requires a correctional officer to go into that area without having full and complete awareness of the situation and officers can hear from the radio whether the courtyard is clear or not, and can ask for such confirmation from MCCP through the same radio system. When entering the courtyard and noticing inmates gathering under EM-22, officers can walk away and use any other door, or issue verbal orders to disband and move along. The appellant submits that the only occasion where an officer might have to be in the courtyard without freely making that choice would be in case of an emergency response during which back-up deployment assistance would first be initiated, thus benefiting from all the usual support and tools normally available in such cases.

[10] As to the applicable law and jurisprudence, the appellant notes that under the most recent definition of "danger" that came into force on October 31, 2014, a three-prong interpretation test has been developed in *Canada (Correctional Service) v. Ketcheson*, 2016 OHSTC 19, that other appeals officers have recognized and applied. That test means that three questions need be asked and answered:

1) What is the alleged hazard, condition or activity?

2) a) Could this hazard, condition or activity reasonably be expected to be an imminent threat to the life or health of a person exposed to it?

OR

b) Could this hazard, condition or activity reasonably be expected to be a serious threat to the life or health of a person exposed to it?

3) Will the threat to life or health exist before the hazard or condition can be corrected or the activity altered?

[11] On the first part of the test, the appellant argues that while the Tribunal may be acting in de novo fashion, it is the situation as it existed at the time of refusal that needs to be considered. As such, while not quoting the wording used by Ministerial Delegate Beattie in the direction, as appears above, to describe the alleged hazard, condition or activity, the appellant refers to the wording used by Ministerial Delegate Beattie in the latter's investigation report to summarize the statement of refusal to work to describe such as follows: “Correctional Officer 1 Sandrina Courtepatte refused to work in the inner courtyard of the institution, because there is a danger that arises when parts of the courtyard are not covered by an immediate armed response when Control Post EM-14 is not staffed between the hours of 07:00 and 16:00, Monday to Friday.” Additionally, referring again to *Ketcheson* in maintaining that an alleged hazard, condition or activity has to normally be a direct cause of harm and not a root cause in the management system that could lead to a direct cause, the appellant submits that the role of the Tribunal, thus the undersigned, in the current appeal is not to review management's decision not to staff EM-14 during the noted hours, but rather to determine if a danger existed in the inner courtyard while EM-14 was not manned. In this respect, the appellant frames the "danger" to be evaluated in terms of an "activity", rather than a "condition in the work place", which is how Ministerial Delegate Beattie described the "danger" in the direction. This being so, the appellant resorts to the two descriptives in stating what the first element of the test must be, and states that if one considers that being exposed to potentially violent inmates in certain areas of the courtyard could be a hazardous "condition" for the respondent, or if one sees that responding to an incident with a potentially violent inmate in the same areas while EM-14 is not staffed could constitute a hazardous "activity", the activity that must be analyzed by the Tribunal may be framed as follows: (Does) the risk for the respondent to be assaulted or to be the subject of an attack when exposed to inmates in the courtyard while EM-14 is not staffed constitutes (sic) a danger as define (sic) by the *Code*. Answering that question requires that the second part of the *Ketcheson* test be applied, to wit whether that condition or activity could reasonably be expected to be an imminent or serious threat to the life or health of the respondent.

[12] On the question of whether the hazard alleged by the respondent on the day of the refusal presented an imminent threat, it is the position put forth by the appellant that the evidence presented to the Tribunal at appeal does not support a finding of imminent threat. The appellant in this regard argues that in order to decide on this, the undersigned needs to apply the rationale developed by the appeals officer in the *Ketcheson* case cited above. In that decision, the Tribunal stated that "an imminent threat is established when there is a reasonable expectation that the hazard, condition or activity will cause injury or illness soon (within minutes or hours). The degree of harm can range from minor (but not trivial) to severe. A reasonable expectation includes a consideration of: the probability the hazard, condition or activity will be in the presence of a person; the probability the hazard will cause an event or exposure; and the probability the event or exposure will cause harm to a person." In this regard, the appellant submits that in the present case, there has been no evidence put before the undersigned that would demonstrate that an assault on the respondent or any other correctional officer was on the verge of happening in a matter of minutes or hours. As such, on that day, there was nothing out

of the ordinary nor were there any specific threats to the respondent or any other officer at the Edmonton Institution concerning the inner courtyard or the movement of inmates. The appellant again finds support for this position in *Ketcheson*, where the appeals officer considering a similar situation, stated that "there is no doubt the level of harm from inmate violence can range from minor to severe, but that is not the issue. There was nothing in the evidence put before me to indicate that there was a reasonable expectation that the respondent would be exposed to violence from an inmate on the day of the work refusal and that he would be harmed through inmate violence. The testimony of the respondent was that he was not exposed to an imminent or serious threat on the day of his work refusal." The appellant is thus of the opinion that the analysis conducted by the undersigned should focus on the determination of whether the hazard, condition or activity could reasonably be expected to constitute a serious threat to the life or health of the respondent when she refused to work.

[13] On this notion of serious threat, the appellant again notes that the *Ketcheson* decision (supra) serves as a benchmark. In that case, it was stated that "a serious threat is a reasonable expectation that the hazard, condition or activity will cause serious injury or illness at some time in the future (days, weeks, months, in some cases years). Something that is not likely within the next few minutes may be very likely if a longer time span is considered. The degree of harm is not minor; it is severe. A reasonable expectation includes a consideration of: the probability the hazard, condition or activity will be in the presence of a person; the probability the hazard will cause an event or exposure; and the probability the event or exposure will cause harm to a person." The appellant has argued that the determination in this case of whether there was exposure to a serious threat to life or health requires that there be a reasonable expectation that the respondent would have been faced on the days, weeks or months ahead with a situation resulting from the non-manning of post EM-14 that could cause her serious harm. Such determination cannot, according to the appellant, be founded on a hypothetical possibility, as recognized by the Appeals officer in *Arva Flour Mills Ltd. v. Matthews*, 2017 OHSTC 2. Determining whether the possibility of a threat is real as opposed to remote or hypothetical is not always easy. On this, the appellant refers to the words of the appeals officer in *Brink's Canada Ltd. v. Dendura*, 2017 OHSTC 9, to the effect that "it is a matter of fact in each case and will depend on the nature of the activity and the context within which it is executed. Statistical information is relevant to make an informed factual finding on that question, although in the final analysis, it involves a question of appreciation of the facts and judgment on the likelihood of occurrence of a future event, in the present case an event that is linked to unpredictable human behaviour." On this point in particular, the appellant is of the opinion that a thorough review of the evidence before the Tribunal can lead solely to a conclusion of hypothetical threat.

[14] On this latest conclusion, the appellant notes the following elements of the violence that it considers are relevant and decisive:

- The inner courtyard is not used for recreational purposes and only for the movement of inmates;

- The employer is responsible for the deployment of officers and follows a national policy;

- Inmate movements are strictly controlled and the subject of a precise and elaborate procedure adopted by the employer;

- MCCP plays a crucial role during inmate movements;

- All correctional officers should have a radio when working. Radio communication is always available and officers can use it before entering the inner courtyard;

- As a result, officers have the possibility of ensuring that the inner courtyard is safe before entering. Consequently, if an officer accesses the inner courtyard when inmates are present, it is by choice;

- When in the inner courtyard, an officer does not necessarily have to go under EM-22 (blind spot under overhang) and if someone is there, the officer can use other doors or pathways;

- At the beginning of one's shift, an officer will normally reach one's assigned post through tunnels or corridors;

- When multiple inmates are in the courtyard, an officer can and should avoid entering the inner yard until it is cleared;

- There is no history of officers being assaulted severely in the inner courtyard. The sole incident cited by the respondent (February 14, 2011) happened in a very specific context and only once. The respondent was not present during that incident and personally never observed an officer being assaulted by an inmate in the inner courtyard;

- In the February 14, 2011, incident, emergency response was efficient and quick. No shot was fired from any of the armed posts and no officer was directly assaulted or injured and the assault was by inmates on inmates. There is no indication that an armed response would have changed the outcome;

- Most of the witnesses trained and authorized to use firearms in the Institution who were brought forth by the respondent have used firearms very rarely over their generally long careers. Firearms have never been used in the inner courtyard;

- While warning shots could be useful, those can occur only when the situation reaches a specific point in the Situation Management Model (SMM);

- Warning shots can be fired from EM-22 or EM-3 control posts and EM-14 can also be manned at such time where the situation warrants such action; and

- The Situation Management Model stipulates that an armed response is to be the last option. Shooting at a target underneath the EM-22 overhang from EM-14 would be very risky because of the distance involved and other factors affecting the precision of the shot, as explained by the respondent's own witness (Lingrell-re: firearms

training) and also by some of the appellant's witnesses (James and Otto).

[15] Given the above, the appellant has argued that while there may occur occasions where the respondent, in the course of her regular duties, could be exposed to potentially violent inmates in the inner courtyard, or even that an assault by such an inmate could be possible, the numerous measures in place at the Institution mitigate the risk for the correctional officer(s) to such a point that it is not possible to reasonably expect that the respondent would be faced in the days, weeks or months ahead with a situation that could cause her serious harm as a result of EM-14 not being manned between 07:00 and 16:00, on weekdays. Additionally, the appellant puts forth that there is nothing in the evidence before the Tribunal that demonstrates that the manning of EM-14 would necessarily prevent an assault or would be necessary to provide an efficient response to such a situation. The sole incident noted by the respondent (assault on inmates) to have taken place in that area of the courtyard was controlled and resolved within minutes and no armed response was required and no correctional officer was injured during the emergency response. When that situation occurred, EM-14 was not manned and despite the severity of the situation, no officer needed to be deployed to EM-14 to provide an armed response. This shows, as argued by the appellant, that a quick and efficient response does not necessarily call for an immediate armed response, which is a last option measure not necessarily compatible with a quick response when responding to an emergency. According to the Situation Management Model, a warning shot should be considered before attempting an aimed shot and according to the evidence, such warning shot can be made from either EM-22 or 3 Control, thus allowing sufficient time to deploy an officer to EM-14 if deemed necessary. The appellant notes the evidence from the respondent to the effect that where needed, EM-14 can be rapidly manned, this effectively being relevant to the third part of the *Ketcheson* (supra) test as demonstrating that the hazard can be corrected before it could become a "danger" as defined by the *Code*.

[16] Based on the above, the appellant submits that the hazard referred to by the respondent through her work refusal represents nothing more than a mere hypothetical possibility, one not supported by the evidence and the history of violence towards correctional officers in the inner courtyard. Pointing to the single incident referred to as a precedent by the respondent (February 2011), the appellant notes that no officer needed to be deployed to EM-14 and no warning shots were fired from either EM-22 or 3 Control during the response. In point of fact, the appellant submits that according to the evidence before the Tribunal, no warning shot or any other use of a firearm has ever occurred in the inner courtyard. The appellant further contends that should the undersigned come nonetheless to the conclusion that the non-manning of EM-14 does constitute a danger for correctional officers in the inner courtyard, such constitutes a normal condition of employment for the respondent.

[17] On this last element of normal condition of employment, the appellant submits that any circumstances or conditions associated with correctional officers being exposed to inmates in the inner courtyard of Edmonton Institution without EM-14 being manned would be covered by paragraph 128(2)(b) of the *Code*, which precludes an employee from refusing to work where the danger is seen as a normal condition of employment. Such "danger" represents a "residual hazard" that remains after the employer has taken all "reasonable steps" to mitigate such. In this respect, the appellant points to the well-established jurisprudence that the possibilities for correctional officers to encounter inmate violence and/or assault are all normal conditions of employment under the *Code*. The appellant links this to the unpredictability of human behaviour

and the particular context of being in a correctional environment. On this, the appellant points to the words of the appeals officer in *Stone v. Correctional Service of Canada*, 02-019, to the effect that "the risk of being assaulted with a weapon, any type of weapon... is part and parcel of the job of a correctional officer. That risk is, however, mitigated by the numerous controls, security policies and procedures put in place by Correctional Service of Canada." The appellant puts this in line with the CX1 Job Description which, under “Working Conditions,” outlines the inherent risks of the job, those including "the risk of severe injury and/or death due to violence or assault by an inmate, risk of verbal or physical assault and/or psychological trauma, risk of exposure to bodily fluids that may harbour communicable diseases and the risk of being targeted in the course of incidents such as hostage taking scenarios." It is the position put forth by the appellant that at a maximum security establishment, the norm and expectation is for staff to be in direct contact with inmates on an ongoing basis and that as such, it is recognized that there is an inherent risk in working in such an environment. The appellant contends, however, that such risks are managed through static and dynamic measures such as equipment, training, staffing complement, contingency plans or response teams and tools that are designed to control, contain and resolve incidents. According to the appellant, the presence of inmates in direct contact with staff in some areas where armed response/intervention is not an immediate option, such as EM-14, is the norm at maximum security sites. Such situations are deemed manageable risks based on the safeguards in place.

[18] The final part of the analysis in such circumstances is thus to look at whether the employer has taken all reasonable steps to mitigate any risks posed by such a hazard that is an inherent part of the job. It is the position of the appellant that the evidence clearly demonstrates that in this case, the employer has done precisely that through the numerous measures it has put in place to protect correctional officers during inmate movements through the inner courtyard. There has been no demonstration that injury or illness has resulted in any case from the non-manning of EM-14. There is thus no evidence that the appellant has failed to take all reasonable steps to protect the health and safety of correctional officers. To the contrary, all the protective measures put in place constitute reasonable steps aimed at ensuring the health and safety of working correctional officers when it comes to inmate movements in the inner courtyard of Edmonton Institution. As a consequence, any residual danger represents a normal condition of employment.

[19] The appellant's position can thus be summarized as follows. Given the evidence, the idea of an inmate injuring an employee in the inner courtyard or any other circumstances suggested through the work refusal of the respondent are hypothetical. The institutional reality is that the potential for inmates to turn violent will always exist in an institutional setting, this despite ongoing efforts by staff and management. The concerns identified by Ministerial Delegate Beattie and by the respondent are not specific but general in nature and revolve around the reality that correctional officers are exposed to inmates in a maximum security institution. The hazard identified by the respondent in her work refusal does not correspond to the most recent definition of danger under the *Code* and should be considered a normal condition of employment.

[20] The appellant is thus of the opinion that the finding of danger as well as the related direction issued by Ministerial Delegate Beattie should be set aside and the present appeal allowed.

B) Respondent's Submissions

[21] It is put forth by the respondent that one cannot properly understand the danger caused by the decision not to man EM-14 unless one has a proper understanding of both the movement of inmates and staff in the courtyard as well as the configuration of the various posts. As a starting point, the respondent argues that the courtyard is used for the movement of inmates as well as staff. Where inmates are concerned, the respondent repeats what has been mentioned previously, to wit that the inner courtyard serves as a thoroughfare for inmates leaving or returning to their living units, going to or having gone through one of the control posts mentioned above. It is emphasized, however, that inmate searches occur only at control posts and not at sub-control posts when leaving the living units, this meaning that all inmates travelling from the living units to a control post go through the inner courtyard without having been searched by a correctional officer, translating into greater opportunities to be armed when in the courtyard. It is pointed out in this respect that when travelling through the courtyard, inmates are not restricted to a particular path and effectively most often use the sidewalk in front of the unit, under the overhang. This is presented as being especially true in the winter where the middle of the courtyard is not plowed and the overhang offers protection against snow.

[22] Inmates are usually let out six at a time in the courtyard from their living units. The respondent, however, points out that the evidence has shown that the living unit sub-control does not wait for those inmates to be processed at 2 and 3 Control before releasing other inmates into the courtyard, this meaning that additional inmates may pool in the courtyard, especially since 3 Control, unlike 2 Control, does not have a vestibule to hold them, meaning that those "extra" inmates are left to wait outside in the courtyard.

[23] As for the movement of staff in the courtyard, the respondent points to the evidence that this is the main thoroughfare between units and that it is common for correctional officers to be there at the same time as inmates between 07:00 and 16:00, on weekdays, in many instances, with some of those inmates coming from the living units and thus not having been searched. In this last respect, the latter points to a number of reasons for staff being present:

- The courtyard is used to roll the kitchen carts from the kitchen to the living units, using only the sidewalk under the overhang (sidewalks crossing the yard having stairs);

- Officers working in the living units need to go through the courtyard to get access to institutional supplies such as toilet paper, bedding and cleaning products;

- The courtyard is used to go to the breezeway by E/F units to dispose of garbage, this necessitating being in the blind spot under EM-22;

- Officers use the courtyard to get to or from their post, at the beginning, end or at any time during their shift. The interior tunnels are only used to open and close 2 and 3 Controls in the morning and at night. According to the respondent and contrary to what the latter states has been suggested by the appellant, there is no traffic through the tunnels between 07:00 and 16:00. on weekdays;

- Officers who need to see a manager in the front of the building by 2 Control go through the courtyard, which is also used to gather the belongings of inmates at Admission and Discharge; and

- The courtyard serves as a route for officers responding to an emergency.

[24] Given what precedes, the respondent argues that while the courtyard is monitored by the officer constantly manning the Main Communication and Control Post (MCCP), this is not without shortcomings, given the number of screens to observe and the number of available feeds. Furthermore, the respondent disputes the suggestion by the appellant that MCCP monitors all inmate movements, arguing instead that it is involved solely in major inmate movements as opposed to minor such movements that may comprise two or three inmates moving at the same time, and offers as example inmate(s) going to health care or chapel. This being said, the respondent disputes the claim by the appellant that the employer has adopted a precise and elaborate procedure regarding inmate movements, noting that the sole evidence of such has come verbally from witnesses, none of whom making mention of a written procedure that would have been adopted by the employer, this contrasting with the appellant submitting numerous commissioner's directives and policies on a variety of topics to support its position.

[25] The respondent also challenges the validity of the appellant's submission that there is no history of officers being assaulted severely in the inner courtyard. It is the respondent's opinion that such a statement is at best hypothetical and lacking any credible foundation, given that in his testimony in this regard, Warden Otto was completely unable to provide any objective and reliable information on this, even though the latter claimed to have taken part in a study by management on this matter, nor did he recall providing, knowing or using a common definition of "serious injury" for that purpose. On the other hand, the respondent points to a serious incident, a fight between several inmates, that did happen in the courtyard on February 14, 2011. On that occasion, only EM-22 was manned and the officer manning EM-22 at the time did witness the beginning of the fight, until he lost sight of the participants when they moved under the overhang. The evidence provided by that witness is to the effect that when this occurred, all he could do was to transmit information over the radio as there was no possibility for him to further assist the correctional officers who responded to the incident, this including the use of a firearm. In that incident, the evidence shows an officer struggling to control an inmate right under EM-22, in the blind spot, with weapons being involved and inmates suffering serious injuries. The presence of weapons at that time consequently required a search of the courtyard after the incident, with a 4-inch and an 8-inch weapon being found.

[26] The respondent submits that the said event, which caused concerns to be expressed to both the employer and the union as to the blind spot under EM-22 being a "vulnerable place" and a "prime spot to take care of business for inmates", represents but one example of an incident in the courtyard where EM-22's capacity to intervene is reduced by the blind spot created by the overhang. In this regard, the respondent draws attention of the undersigned to testimony provided at the hearing by a courtyard monitor (Kevin Lingrell) to the effect that he has witnessed threats from inmates to staff in said courtyard, that he was present there while inmates were armed with metal bars, knives and other weapons and that he witnessed more than 20 assaults therein with at least five being serious and involving knives and other weapons.

[27] Evidence was offered by both sides regarding various other measures available to correctional officers for safety in their work, with opposing testimonies being heard in this regard. One of those measures concerns radios and their availability to correctional officers. The respondent submits that while the appellant has argued that every correctional officer has a radio, a different version was offered by some witnesses, to wit that there are not enough radios for every correctional officer, since supplemental officers are called in to work almost every day. Furthermore, officers are only required to wear radios when they work in a living unit or a multi-function post. The respondent further submits that radios are issued to the post and not to the correctional officer, with the result that when a correctional officer leaves a post, the radio stays at the post. Given the issue at hand, this means that officers coming on duty and travelling through the courtyard do not carry a radio, as is also the case for officers ending their shift who pass on the radio to the relieving officer. The respondent submits that this is also the case when officers change posts during a shift, meaning that as a whole, on a daily basis, there are correctional officers travelling through the courtyard without a radio.

[28] The respondent also notes that some appellant witnesses presented the personal portable alarms (PPA) worn by every correctional officer as a measure to diminish the risks that they may face. According to the respondent however, portable alarms are not a tool to protect against assaults or to control an inmate. The single purpose is to send an alarm to MCCP where the MCCP officer must then look through a sheet to find out which officer has been assigned that alarm and then identify the general area where the officer is located before communicating that information to the correctional managers' office (EM-6) for coordination of the response. It is submitted by the respondent that the time length of this process makes it impossible for MCCP to ensure a response in timely fashion where it only takes seconds for an inmate to inflict serious or even deadly injuries, hence the importance of a fast armed response. In the respondent's opinion, given what precedes, PPAs cannot be seen as a measure to reduce the risk to officers when in a situation of potential bodily harm or death. To supplement this particular point, the respondent also submits that the PPAs are only effective 70 to 80% of the time, that the sensor occasionally provides false information causing staff to be sent to the wrong area and thus, given the time consuming identification procedure, response to the alarm is delayed.

[29] The respondent also objects and challenges the repeated appellant claim that correctional officers have the "choice" of entering the courtyard only when it is safe to do so. In the respondent's view, such a claim evacuates a crucial portion of a correctional officer's job and responsibility, one over which the latter has no choice to refuse, to wit responding to incidents, the variety of which extending to serious ones where weapons are involved. The respondent finds support for such pronouncement in the following words of the appeals officer in *Armstrong v. Canada (Correctional Service*), 2010 OHSTC 6, at para. 52:

> [...] the evidence persuades me that COs have the status of Peace Officer and that COs are responsible for intervening where an inmate may be harmed. I am further persuaded that the work of COs involves a conflict between duty to intervene and duty to protect themselves and their partners. Given the dynamics associated with an incident, it is not clear or self evident from the evidence as to how COs are to achieve the two opposed requisites. Given the strong language in the Correctional Officers job descriptions and post orders, I expect that the tendency of COs will always be to intervene."

It is the respondent's view that the present case outlines the same concern as that which is raised in the *Armstrong* decision. Furthermore, the latter notes that management has given no directive to the effect that it is an unsafe practice for correctional officers to be in the courtyard at the same time as inmates or to stop the latter from doing so. In point of fact, the respondent points out that various witnesses noted that it is very common for staff and inmates to be in the courtyard at the same time.

[30] Addressing the issue in the present case from a legal perspective, the respondent submits that in considering first the question of whether or not a danger existed on May 26, 2015, for CO Courtepatte, one must apply the test determined in *Correctional Service Canada v. Ketcheson*, 2016 OHSTC 19, to the definition of danger formulated at subsection 122(1) of the *Code*, said test presenting the following questions:

- What is the alleged hazard, condition or activity;

- Could this hazard, condition or activity reasonably be expected to be an imminent or a serious threat to the life or health of a person exposed to it; and

- Will the said threat exist before the hazard or condition can be corrected or the activity altered?

[31] On the first part of the test, the respondent defines the hazard as that of being stabbed or killed in the blind spot with no armed intervention coverage. This being the case, the respondent addresses the second part of the test by first making no representation on whether the hazard poses an imminent threat to the life or health of a person exposed to it, and by centering on or restricting her representations to whether the hazard can be expected to be a serious threat to the person exposed to it. The respondent thus refers the Tribunal to a number of decisions by appeals officers that analyze the notion of *seriousnes*s, those being *Arva Flour Mills*, 2017 OHSTC 2, *Keith Hall & Sons*, 2017 OHSTC 1, and *CSC v. Laycock*, 2017 OHSTC 21, and pinpoints the characteristics of such as the presence of a reasonable possibility, which evacuates hypothetical elements, and the reality of severe harm. In *Keith Hall*, the appeals officer stated that "in the case of a serious threat, one must assess not only the probability that the threat will cause harm, but also the seriousness of the possible harmful consequences from the threat. Only those threats that can reasonably be expected to cause severe or substantial injury or ill may constitute serious threats to the life or health of employees. (...) To conclude that a danger exists, there must be more than a hypothetical threat. A threat is not hypothetical where it can reasonably be expected to result in harm, that is, in the context of Part II of the *Code*, to cause injury or illness to employees."

[32] In assessing the existence and seriousness of danger from the perspective of reasonable possibility or expectation, the respondent also submits that an additional characteristic must enter into the equation, particularly in the correctional environment. That characteristic is the unpredictability of human (inmate) behaviour, a notion that has been addressed numerous times in the Tribunal's jurisprudence as well as in Court decisions such as *Armstrong v. Canada (Correctional Service)*, a 2010 decision by an appeals officer concerning a situation at a maximum security institution (Kent) where, having found that correctional officers at that institution were

exposed to a potential hazard, the appeals officer stated that "COs (...) are exposed to a potential hazard. That potential hazard is spontaneous assaults by maximum security inmates. The evidence (...) confirms that spontaneous attack by an inmate can occur without provocation and without warning. The evidence also confirms that inmate behaviour can go from cooperative behaviour to behaviour causing bodily harm or death without a progressive escalation of aggressiveness'."

[33] Noting that in *Laycock* (supra), the appeals officer associated the notions of "reasonable expectation" and "threat" in the definition of "danger" in the *Code* with the notion of "reasonable possibility" that a hazard will materialize and cause harm, the respondent submits that while the definition of "danger" may have been recently amended, court pronouncements preceding this latest definition, such as *Verville v. Canada (Correctional Service)*, 2004 FC 767, and *Martin v. Canada (Attorney General)*, 2005 FCA 156, still have application or relevancy. As such, the respondent points out that in Verville, the court opined that injury need not happen immediately upon exposure, nor is it reasonable to expect that injury will occur every time the condition or activity occurs or necessary to pinpoint when the potential condition or hazard or the future activity will occur, concluding that if a hazard or condition is capable of coming into being or action, it should satisfy the definition of "danger". The respondent thus draws from what precedes that it is not necessary to demonstrate that multiple serious assaults towards correctional officers have taken place in the courtyard to demonstrate that a danger exists when no armed response is available in a vulnerable area, and that, as found in *Laycock* (supra), "assaults of correctional staff may occur without warning, in a matter of a few seconds, and without having received intelligence or indicators that attacks against staff were contemplated," regardless of whether the institution is a medium or maximum security establishment, or whether a Threat Risk Assessment (TRA) has been conducted since such a TRA cannot predict if or when attacks will occur.

[34] The respondent offered as evidence to the presence of danger the testimony of a number of correctional officers and has argued that such testimony can be accepted by an appeals officer to make a finding of danger. It is the view of the respondent that a new definition of "danger" in the *Code* has not affected the type of evidence that can serve to establish the existence of danger, thus maintaining the relevance of the court pronouncement in *Verville* (supra) to the effect that "there is more than one way to establish that one can reasonably expect a situation to cause injury. One does not necessarily need to have proof that an officer was injured in exactly the same circumstances. A reasonable expectation could be based on expert opinions or even on opinions of ordinary witnesses having the necessary experience when such witnesses are in a better position than the trier of fact to form the opinion." Described as "job experience based opinion", the respondent argues that the advent of a new definition of "danger" has not altered the validity of this court pronouncement which has been adopted in many other cases. As regards the present case, the respondent submits that all the witnesses presented by the latter have extensive experience working at Edmonton Institution as correctional officers, a strong knowledge of the various posts, the institution layout, inmate behaviour and institutional routine. In short, the respondent submits that their testimony should be determinative as they have the necessary experience to establish that the lack of armed coverage in the blind spot could cause serious injury or death.

[35] As for the next element of the test for determining or assessing danger, to wit "will the threat to life or health exist before the hazard or condition can be corrected or the activity altered", the respondent's position is in direct contradiction to the position put forth by the appellant. The respondent submits that the suggestion by the appellant that a pre-emptive correction exists of

either taking a shot from 3 Control or manning EM-14 is not a possibility supported by the evidence of the numerous limitations preventing 3 Control from taking an effective shot in the blind spot or the time needed, to wit the delay involved in effectively manning EM-14 to provide a timely armed response in the case of an ongoing incident or aggression. It is the respondent's view that “there exists no substitute for an immediate armed response when it is needed, to wit when officers and/or inmates are at risk of grievous bodily harm or death.” According to the respondent, the evidence has shown that only EM-14, when manned, can provide such immediate armed response for a large portion of the courtyard. Where the appellant argues that the evidence does not demonstrate that the staffing of EM-14 would prevent an assault or would be necessary to provide an efficient response, the respondent submits that such a position by the appellant is contrary to the evidence to the fact that only EM-14 can provide an armed response in the blind spot, that staff presence represents a deterrent and that inmates would know that EM-14 is staffed simply by looking at the window. Furthermore, given the limitation of 3 Control's arc of fire and EM-22's restricted view because of the overhang, the respondent suggests that the blind spot represents approximately 30 to 40% of the courtyard. In short therefore, the position taken by the respondent is that in the case of an incident, particularly in the blind spot, the threat to health or life will exist before the measures suggested by the appellant result in the correction of the hazard or condition or the alteration of the activity.

[36] On the third element of the test, as to whether the danger constitutes a normal condition of employment, the respondent bases its submission that it does not on the notion of normal condition of employment developed in case law identifying such as residual in nature and as the danger that remains after the employer has taken all necessary steps to eliminate, reduce or control the hazard, condition or activity and for which no direction can reasonably be issued under subsection 145(2) of the *Code* to protect employees. Submitting that the low frequency, high risk principle can apply to the work of correctional officers, the respondent argues that the danger suggested in the present case does not constitute a normal condition of employment, as the evidence has demonstrated that the consequences of a delay in armed response could be death or grievous bodily harm within an extremely short period of time. In the respondent's opinion, while there may be in place a number of control measures and procedures on which the appellant is basing its opposition to a finding of danger, the appeals officer must primarily be concerned with the effectiveness of such, as was decided in *UCCO-SACC-CSN v. Attorney General of Canada*, where the Federal Court concluded that: “It is not sufficient for the appeals officer in assessing whether or not the first part of his ‘'danger’" test is met, to simply look at the measures taken by the CSC to reduce the danger. The test requires that the appeals officer not only look at the actions of CSC, but also the success of those actions in eliminating, or controlling the hazard, condition, or activity.” The respondent finds added support for this argument in the case of *Attorney General v. Brian Zimmerman*, 2015 FC 208, where the Court had endorsed the conclusion of the appeals officer who had noted the failure by the employer to demonstrate how the numerous policies, procedures and standing orders in place and other measures concerning the control of inmate movements could mitigate the absence of live feed of certain cameras to MCCP. Likewise, the respondent sees the position put forth by the appellant, based on the TRA, that at maximum security sites, it is the norm that armed intervention not be an immediate option even where inmates are in direct contact with staff in some areas, as being in direct contradiction with another part of the said TRA listing areas where such intervention is available, said list including "main circulation areas", and notes that said TRA, a document of general purpose, does not deal specifically with the situation at Edmonton Institution, armed intervention in the courtyard or the specific situation of a blind spot created by the overhang.

In other words, the respondent argues that the Threat Risk Assessment (TRA), as a document of general purpose presenting a broad scoping assessment, should be given little weight when considering a situation whose specificity/uniqueness requires an adapted evaluation. The respondent also draws attention to the inconsistency of the appellant's position where the latter, referring to the TRA concluding in part that "the provision of armed intervention is one measure in mitigating the risk", has deemed it necessary to man EM-22 to mitigate the risk for 60 to 70% of the courtyard, yet suggests that other measures are sufficient to mitigate the risk of the 30 to 40% of the courtyard that cannot benefit from armed intervention when EM-14 is not manned. The respondent submits that such position does not stand ground, particularly when one considers that staff specifically have to travel under the overhang for multiple reasons. Furthermore, where the appellant claims "normal condition of employment" which is based on the principle of every step having been taken to eliminate, reduce or control the hazard, yet refusing to man EM-14, the respondent submits that the "normal condition of employment" argument could be resorted to by the appellant only if the latter had opted to man EM-14 on weekdays between 07:00 and 16:00.

[37] As a final part of its submissions, the respondent turns to the evidence to address some arguments made by the appellant regarding the exactness or veracity of some conclusions arrived at by Ministerial Delegate Beattie, essentially disregarding the fact that this appeal is a de novo process. Briefly therefore, the respondent's submissions are that the evidence can support an assumption that removal of the manning of EM-14 was caused by management interrupting funding, that following an anteriorly announced intention to stop manning EM-14 (6 months), no further discussion with the JOSH committee or announcement occurred prior to the staff briefing of May 26, 2015, regarding a consequent needed adjustment to the response protocol, that evidence was received at the hearing that supports a conclusion that inmates would become aware of the non-availability of an immediate armed response, and finally that the analogy to a pool and to the role of lifeguard made by Ministerial Delegate Beattie, while being just that, usefully conceptualizes the role of EM-14 in light of the time allowed inmates to get to their destination, the relative freedom to choose a path and to gather while awaiting to be searched at 2 or 3 Control. In addition, as to the incorrectness of analogy to a lifeguard argued by the appellant, the respondent points to the already made argument about the limits to a 3 Control armed response that would supplement the immediate response capability from EM-14 and EM-22, to the fact that officers coordinating major inmate movements may not be capable of providing immediate armed response and that the officer occupying the MCCP position has multiple other duties and multiple camera feeds to scrutinize in addition to keeping close scrutiny over the courtyard and those present therein. The respondent submits that since armed response is based on the risk of grievous bodily harm or death, it is fallacious to suggest that in such a situation, responding officers would first need to resort to other means or tools before the armed response and additionally, that the delay in manning an unmanned EM-14 position to intervene makes that a non-option since by that time the incident or aggression, with the potential results, would be "over". Furthermore, given that correctional officers constitute the deployment assistance needed in case of aggression in the courtyard, the respondent submits that where EM-14 is not manned, the responding assisting officers would not benefit from the usual support that would allow them to respond with confidence if the situation were to escalate or if weapons were introduced. Finally, the respondent disagrees with the suggestion that COs can choose to enter the courtyard at times when inmates are loitering since the evidence shows that each officer working in a living unit has to go through the courtyard many times a day, that officers are not required to check the courtyard before entering

and finally, that given the multiple duties of the MCCP officer, the latter cannot be constantly keeping an eye on the courtyard.

[38] In conclusion, the respondent does state the following:

- There is compelling evidence to support the conclusion that a danger exists. Without EM-14 being manned between 07:00 and 16:00, on weekdays, there is a reasonable possibility for the refusing employee to suffer serious injuries or death;

- The evidence has shown that inmates enter the courtyard from their living units without being searched, thus an increased possibility of their being armed, and pool in the courtyard while awaiting to be searched. Correctional officers must use the courtyard continuously during their shift as a thoroughfare, with inmates also being present, and must circulate under the overhang by EM-22, the so-called "blind spot";

- The blind spot is a prime area for inmates to engage in assaultive behaviour, precisely because there is limited view for correctional officers and limited armed response possible. In case of emergency, only EM-14 can provide an immediate armed response in the blind spot. 3 Control cannot provide an armed response because of all limitations caused by the gun port. Suggesting manning EM-14 if needed in case of an emergency is not an option as the time needed to achieve this would mean that an officer being assaulted would already have suffered injuries or death; and

- The hazard does not constitute a normal condition of employment. The numerous generic procedures and assessments provided by the appellant employer do not eliminate, reduce or control the hazard caused by the absence of armed response in the blind spot. The fact that a maximum security establishment represents an inherently dangerous environment cannot exempt CSC from taking all steps to eliminate, reduce or control the hazards faced by correctional officers when responding to incidents. Stating that the usual tools carried by COs during their shift at any post are sufficient to address the hazard ignores the specific causes of danger in the blind spot and does not constitute a mitigating measure.

The respondent thus asks that the undersigned confirm the decision rendered by Ministerial Delegate Beattie.

C) Reply

[39] By way of reply, the appellant does not address the respondent's characterization of the facts or the latter's proposed application of such to the law, and limits itself to challenging the exactness of some statements put forth in submissions by the respondent. In this respect, the appellant contends that EM-22 and EM-14 are not the only posts through which a direct observation that the courtyard is clear can be provided, since ground staff at 2 and 3 Control can

also provide confirmation of such in addition to indirect observation by MCCP. Furthermore and contrary to what is suggested by the respondent, the appellant contends that the evidence submitted as well as the site visit demonstrate that MCCP is involved in all inmate movements, calling and controlling major movements and monitoring minor movements through areas. The appellant notes that the position taken by the respondent on this matter in this case, which amounts to minimizing the role of MCCP, is contrary to the position it has taken on this same issue in other cases. As to the number of inmates present in the courtyard at the same time, the appellant argues that the number of 15-20 is rare during the day shift and is more attuned to evening movements where both EM-14 and EM-22 are staffed.

[40] With respect to the movement of kitchen carts, the appellant claims that the evidence and the site visit have shown that such movements are not restricted to the walkway under the overhang and that the paths in the middle of the courtyard can also be used (regardless of the steps), thus making the use of the area under the overhang a matter of choice or preference. Along the same line of personal preference, the appellant submits that circulation by personnel through the courtyard has traditionally been based on their own choosing, since officers have the ability to utilize tunnels to access all living units and areas around 3 Control. In addition, the appellant describes as purely speculative the 60-70% potential armed response coverage of the courtyard put forth by the respondent with only EM-22 manned, suggesting instead such percentage to be closer to 90%. "On this particular point, it bears noting that neither party's suggested numbers go beyond an approximation since no actual professional measurements were put in evidence, with a resulting difference of opinion as to extent but a common view as to the existence of a blind spot in the inner courtyard"(note by undersigned). As to the rating of staff regarding their training in firearm use and accuracy, the appellant has submitted that at training, staff need to shoot at 70% accuracy in controlled conditions, with a still target, weapon sighted and no distractions, a situation somewhat different than the situation suggested by the respondent in support of her work refusal.

[41] On the availability of radios, the appellant submits that the evidence has shown that staff generally have access to radios, with the exception of some areas that have one base station to share. As regards the PPAs available to staff, it is the position of the appellant that the 70-80% effectiveness rate suggested by the respondent is wholly speculative and supported by no evidence presented at this hearing. In conclusion, while the appellant recognizes that it might not be necessary to demonstrate that serious assaults have occurred, which represents the position taken by the respondent, the appellant suggests that jurisprudence has always found that the absence of occurrences is very useful to make the necessary analysis.

Analysis

[42] The issue to be determined in the present matter being, stated simply, whether a "danger" existed to the refusing employee in the factual circumstances of the case on May 26, 2015. One needs to be clear as to the meaning of this key concept of the *Code* and the refusal process spelled out therein since "danger" has known various definitions throughout the years, the most recent and thus current one having been legislated therein in 2014. Presently thus, "danger" is defined in the *Code* as being “(...) any hazard, condition or activity that could reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it before the hazard or condition can be corrected or the activity altered.” Case law, in particular the

recent, yet limited, case law that has followed the coming into force of this definition, has tended to underline the dichotomous distinction attaching to the notion of "threat" in the definition, where such is described as either "imminent" or "serious" to life or health. While obviously such distinction takes on great importance in the assessment of the existence of "danger", I am of the opinion that the notion that has the uppermost importance in the said definition is that of "reasonable expectation", this linking, in the definition, the sources of threat ("hazard, condition or activity") and the characterization of the threat ("imminent or serious") and, giving the words their grammatical and ordinary sense in harmony with the scheme and object of the *Code*, making it clear that for danger to exist, a threat, as per any of its sources, need only have a reasonable potential of existence as opposed to existing positively, thus situating the defining moment of any hazard, condition or activity achieving the level of threat, whether imminent or serious, somewhere between certainty and hypothetical, with the facts and circumstances of each case determining how close or how far to either end of the spectrum the presence of hazard in the form of an imminent or serious threat is situated. Stated more directly, given the definition of "danger" in the *Code*, each case needs to stand on its own facts which, to attain characterization as threat, whether imminent or serious, need not be a certainty but cannot be simply hypothetical.

[43] This being so, the definition of "danger" represents but one small, albeit important, part of the statute and should not be considered in isolation from the remainder of such, more particularly what is referred to as the "purpose" clause (section 122.1) and the provision that is juxtaposed to the previous and referred to in common OSH practice as the "hierarchy of controls" (section 122.2), this last provision serving as the basis from which is derived the concept of "normal condition(s) of employment". Section 122.1 thus spells out the purpose of the *Code* as being "to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which" the *Code* applies, the word “prevent”, which governs every word of the purpose, being defined in the Canadian Oxford Dictionary as meaning "stop from happening (...); hinder; make impossible." Given that section 12 of the *Interpretation A*ct (R.S.C., 1985, c. I-21) stipulates that "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects", and the words of the Federal Court in *Canadian Pacific Railway Company v. Woolard*, 2006 FC 1332, to the effect that "the adoption of a technical definition (of the purpose) would be to limit the intentions of Parliament to prevent accidents and injury to health in the work place,” I share the opinion expressed by my colleague Strahlendorf in *Canada (Correctional Service) v. Ketcheson*, 2016 OHSTC 19, in relation to the Internal Responsibility System to the effect that "the purpose of the *Code* is to be achieved by protecting employees in the work place (...) wherein the employer and employees are meant to identify and evaluate hazards, eliminate or substitute for hazards if they can and then control the risks posed by hazards such that risk is driven down as low as it can reasonably go in the circumstances so that harm is brought to zero for as long as possible.” This excerpt from *Ketcheson*, in particular the words “identify and evaluate,” “eliminate or substitute” and “control” relate directly to the notion of 'hierarchy of controls" mentioned above, with section 122.2, starting with the notion of prevention by using as the introductory word "preventive", reading: “Preventive measures should consist first of the elimination of hazards, then the reduction of hazards and finally, the provision of protective equipment, clothing, devices or materials, all with the goal of ensuring the health and safety of employees,” and which founds, as I have stated above, the concept of "normal condition(s) of employment" which represents a limit, (there are few) to the personal right of employees, that is the right to refuse dangerous work, presented at section 128 as either the use or operation of a machine or thing, a condition in the place of work or the

performance of a work activity. It is important to note at this time that what was claimed by the refusing employee as cause for refusal to work and what was accepted by Ministerial Delegate Beattie as cause for issuance of a direction on the basis of danger was the existence of "a condition in the work place" that constituted a danger, that condition being the non-manning of EM-14 during the day.

[44] While the concept of "normal condition(s) of employment" is not defined in the *Code*, it has long been present in the process of assessing "danger" relative to refusal to work and has been largely interpreted in case law as being residual in nature and representing the danger that remains after the employer has taken all steps it is ascribed to take, as per the "hierarchy of controls", to eliminate, reduce or control the hazard, condition or activity, and thus a danger that could not be protected against through the issuance of the type of direction that the *Code* provides for in circumstances of danger pursuant to subsection 145(2) of said legislation. While the concept of "normal condition(s) of employment" is widely accepted and rarely questioned as a concept as opposed to whether individual circumstances of a case represent or not conditions prohibiting refusal, it is not trivial to broach anew, albeit briefly, this notion because of the peculiarity of cases that involve employees at Correctional Service of Canada, correctional officers, whose job description, under the general descriptive "Working Conditions", lists conditions that the employer recognizes may represent a hazard/danger within the realm of the job, but not necessarily a refusable danger within the meaning of the *Code* or "normal condition of employment", again within the meaning ascribed by case law to the expression, depending on whether measures, under the "preventive measures" provision of the *Code* have been taken by the employer. As such, it is useful to cite some parts of the document. Under titles “Work Environment” and “Risk to Health”, the document reads in part:

> “In the conduct of security, there is direct daily exposure to inmates who may be agitated, unpredictable or uncooperative or who may attempt to intimidate or resort to violence. There is minimal control over the frequency or duration of difficult situations. (...) There is a requirement to intervene in threatening or violent situations to protect the safety of members of the public, staff, inmates and the institution (e.g. assaults, riots or hostage-takings), where the use of force may be necessary. There is a potential for inmates to verbally abuse or physically assault the incumbent, who is authorized to take all necessary measures of self-defence (inmate may have deadly intent). Severe anxiety and potential injury may occur during and following violent incidents, which may result in the temporary or permanent impairment or death of the incumbent, members of the public, other staff or inmates. There is no control over the frequency or duration of individual incidents, which may take place within the institution or during the course of escorts. (...) When searching or restraining inmates, there is potential for exposure to bodily fluids and bio-hazardous material that may harbour communicable diseases (...). There is a risk of verbal or physical assault and/or psychological trauma due to the daily performance of security duties in direct contact with potentially volatile inmates who may have low-level cognitive skills and alternate social values/attitudes. (...) There is a requirement to intervene in threatening or violent situations to protect members of the public, staff and inmates, including incidents when the use of force may be necessary. There is potential for inmates to verbally abuse or physically assault the incumbent, which involves a risk of severe

> injury and/or death. There is also a risk of Post-Traumatic Stress Syndrome following traumatic incidents to which the incumbent is subjected (...) and the necessity for the incumbent to use force which may be lethal."
>
> [underline added]

[45] While what precedes represents only part of the albeit generic and employer-produced Job Description of a correctional officer and, because of its generality, it cannot generate a conclusion that the refusing employee in the present case was exposed on the day of her refusal or ever to any or all of the described hazards above, that description in essence serves to establish a *"situation de fait*" common in varying degrees to every correctional institution, and thus serves to ground, as formulated by the employer/appellant, the potentiality of threat to life or health of a correctional officer in that work environment. This partial description of what a correctional officer may be exposed to at work, and the refusing employee would thus be exposed to such "in principle", does not *per se* determine the issue of whether a condition existed in the work place on the day of Ms. Courtepatte's refusal that constituted a danger, thus the question: Was there a danger?

[46] As previously stated, the concept of "danger" was newly defined in 2014 and while it is not necessary to repeat the definition at this time, one must note that in one of the first decisions by an appeals officer under such new regime, a three-prong test was developed to apply to the actual determination of danger in individual cases. Said test, developed in *Ketcheson* (supra), would see first the need to properly identify the alleged hazard, condition or activity at the origin of the refusal action. In the present case, it is a hazardous "condition" that was raised by the employee and found to exist by the investigating ministerial delegate in the work place that is the inner courtyard. The second step in the test, centered on the notion of reasonable expectation, involves determining in the alternative whether the hazard, condition or activity represents an imminent or serious threat to the life or health of the exposed person, the distinction drawn between imminent and serious meaning that an imminent threat is considered, in a manner of speaking, as time sensitive in that it is "on the point" of materializing, the seriousness of potential damage to health or life, while not inconsequential, taking second place to imminence or proximity of occurrence. A serious threat, on the other hand, is to be assessed taking into account the seriousness of results or consequences to health or life with a time span of potential occurrence ranging from hours to days, months and even years. The third and final step of the test calls for an assessment of whether the threat will materialize before corrective action can occur. In their submissions, the parties have not challenged or questioned the propriety of the test. For my part, I am of the view that the test developed in *Ketcheso*n is properly applicable to the situation at hand, although I will comment that application of the third part of said test to a situation involving a work environment where the risk to health or life is a *"situation de fait*" or "part of the job" may present a certain degree of automaticity.

[47] On the first part of the test, to wit what the alleged hazard, condition or activity is, it is necessary to properly identify the basis of the claim by the refusing employee. In this respect, I indicated at the outset that the issue in this case is to be broached in terms of a "condition" in the work place, one that could be expected to become a threat to life or health. In this, I am on the same page as Ministerial Delegate Beattie who, in his investigation report, referred to the statement of refusal by Ms. Courtepatte as pointing to a "condition" in the work place, that being

"(...) a danger (that) arises when parts of the courtyard are not covered by an immediate armed response when Control Post EM-14 is not staffed (...)" and, finding that "the risk of injury or death is part and parcel of the job of a "Corrections Officer", concluded his investigation by issuing a direction that saw the ministerial delegate state that "a condition in the work place constitutes a danger to employees while at work", this condition being described as "Control Post EM-14 is not staffed between the hours of 07:00 and 16:00, Monday to Friday, and therefore a rapid armed emergency response is not provided for the protection of employees who may be located in areas identified as 'blind spots' in the courtyard area". In my opinion, this is the proper perspective from which to consider the present matter. The parties, however, deviated somewhat from this approach, putting emphasis instead on the risk of aggression in the absence of a manned EM-14 post as opposed to the non-manning of EM-14 as the source of danger, thereby neglecting somewhat the essence of the work of a correctional officer, which entails risk of aggression, injury or death as a basic element of employment. For his part, counsel for the appellant sought to remind the undersigned that an alleged hazard, condition or activity "has to normally be a direct cause of harm and not a root cause in the management system that could lead to a direct cause" and that therefore the undersigned would be without jurisdiction to review management's decision not to staff EM-14, thus reducing the risk to be assessed by the undersigned to that of being assaulted or attacked when EM-14 is not manned, as opposed to linking the situation and the conditions of work as constituting the hazard. In the case of the respondent, the latter also reduced the danger to that of being stabbed or killed in the "blind spot under EM-22 with no armed coverage", thereby putting the emphasis on the ever present risk of aggression, injury or death as opposed to linking what is a constant element of the work environment with the situational peculiarity of a partial armed response coverage. I will add in this regard that, while I share the view expressed by counsel for the appellant that my role is not to review the appellant's managerial decision not to man EM-14 as a root cause and not a direct cause of potential harm, I nonetheless am of the view that I can examine in the present case the effect of that managerial decision as constituting a hazard in the circumstances of this case. In this, I share entirely the view expressed by my colleague appeals officer in *Ketcheson* in the following manner: “While there might not always be a bright line between direct causes and root causes, it can be said that the scope of 'danger' is intended to cover direct causes and not root causes. It is recognized that one cannot be overly definitive here. Staffing decisions are usually in the realm of policies; they involve budgets and the allocation of resources. But there are narrow circumstances where staffing could be a hazard; not in the sense that the policy is the hazard <u>but that the results of the policy can be a direct cause</u>.” (underline added). It is my opinion that the case at hand presents exactly such a situation and thus I find that the hazard that needs to be evaluated according to the test combines as condition the characteristics of the penitentiary/work environment recognized circumstances and the absence of an immediate armed response capability where EM-14 is not manned.

[48] The second part of the test requires that the condition described above be examined from the standpoint of whether it can be reasonably expected to be an imminent or a serious threat to the life or health of the person exposed to it. In the case at hand however, while the appellant has made submissions concerning both possibilities, the respondent has made no submissions regarding the first part of the question (imminent threat) and I consider that the respondent has thus conceded that the hazard cannot, or rather could not, at the time of the refusal, reasonably be expected to constitute an imminent threat. There actually never was a claim by the respondent that on the day of the refusal she was on the verge of being assaulted in any manner. I will,

therefore, not deal with that part of the question. There thus remains the question of whether the identified hazard could, at the time of the refusal, be reasonably expected to be a serious threat to the life or health of the person exposed to it, that being the respondent. One needs to add here that, while central to the issue is the absence of immediate armed response in part of the courtyard when EM-14 is not manned, the possibility of injury to health or death to a correctional officer may stem from a targeted assault on the officer or an assault in the course of intervention in incidents involving inmate(s) on inmate(s).

[49] In dealing with this question, I do not propose to recite anew all the evidentiary elements that have been brought forth at this hearing and are described extensively in the pages that precede. There are, however, a number of elements that in my opinion are determinative in arriving at a conclusion and which had also been presented to Ministerial Delegate Beattie as they appear in the latter's investigation report, which is part of the evidence. First, however, a wholly instructive part of this hearing was the extensive commented site visit by the undersigned in the presence of both sides, wherein I had opportunity to visit at length all three armed posts around the inner courtyard and during which I personally witnessed the presence of a number of inmates in the said courtyard on their way from 3 Control to sub-control posts and residential units, as well as the searching of said inmates at 3 Control. I also witnessed at least two correctional officers travelling through said courtyard, albeit with no inmates present at the same time. This visit also made it possible for the undersigned to perceive *de visu* the existence and extent of the courtyard blind spots from both EM-22 and 3 Control armed posts, said blind spots not being as extensive as put forth by counsel for the respondent but more than what was argued by counsel for the appellant. It also made it possible for the undersigned to see that structurally, armed post EM-14 was designed to cover both the courtyard and the gymnasium and that for certain activities or during certain seasons or weather conditions, the covered walkways would conceivably see greater use by both personnel and inmates.

[50] Those additional determinative elements are:

- There is no personal visual line of sight (direct) for the areas identified as blind spots, where the sole coverage is by MCCP camera/screen or mirror, and absent a manned EM-14, there is no immediate firearm response available for those areas;

- Inmates leaving their units into the courtyard are not searched or patted down until they have travelled through the yard to 2 Control or 3 Control or when they leave those;

- The response protocol to incidents or encounters with inmates or between such is the same throughout the institution as per the SMM (Situation Management Model) which provides for gradual or progressive action, culminating with armed warning/lethal force. It has been demonstrated that throughout the institution, whenever the nature or level of seriousness of an incident calls for immediate armed response/lethal force as per the SMM, such can be resorted to, including in the greater part of the inner courtyard that is not the blind spots. However, with EM-14 not manned, the maximum level of force (warning and targeted shot) cannot be available or effective for the areas designated as blind spots before a

time lapse of 2.5 to 5 minutes. While the appellant is of the view that in the case of an emergency such as an assault going on in the blind spots, EM-14 could be manned in less time than what Ministerial Delegate Beattie noted in his report and that, given the gradual steps to be followed by officers under the SMM prior to resorting to armed response, this would allow enough time for such manning. I am of the view, on the other hand, that while a graduated intervention or response protocol may generally be depended upon to control a situation, it cannot be presented as a certainty that a situation will progress in such a manner as to allow officers to react in the graduated manner envisaged in said protocol. One must realize that in an environment marked by unpredictable human behaviour, situations may escalate in seconds requiring officers to adapt in seconds. In this I share the views expressed by the appeals officers in *Laycock*, 2017 OHSTC 21, to the effect that "Assaults to correctional staff may occur without warning, in a matter of a few seconds, and without having received intelligence or indicators that attacks against staff were contemplated," and in *Armstrong*, 2010 OHSTC 6, to the effect that COs are exposed to a potential hazard which is "spontaneous assault by maximum security inmates (...) [which]can occur without provocation and without warning (...)[where] inmate behaviour can go from cooperative behaviour to behaviour causing grievous bodily harm or death without a progressive escalation of aggressiveness"; and

- The appellant has insisted numerous times on the fact that there has never been an assault on a correctional officer in the courtyard. However, there is uncontested evidence that an incident (fight) occurred in February 2011 between inmates under the overhang, thus not an assault directed at a correctional officer but in which incident correctional officers were required to intervene, an intervention that, like any intervention, carried the potential of serious injury. Additionally, there was also uncontested evidence by the respondent herself that she has witnessed assaults on correctional officers at the Edmonton Institution and was herself the subject of similar assaultive action taking various forms, albeit not in the inner courtyard. The respondent was, however, not contested on her testimony of being aware of a staff assault in the courtyard, although not present during the actual occurrence but witnessing the concluding control action by two correctional officers on an inmate.

[51] I have considered all the evidence submitted in the case. Tribunal case law in respect of this question is quite clear. In *Arva Flour Mills Limited,* 2017 OHSTC 2, as well as in *Keith Hall & Sons*, 2017 OSHTC 1, both appeals officers shared opinion as to the reasonable possibility of a threat materializing, with the appeals officer in the first case stating that "A serious threat requires an assessment of the probability that the threat will cause harm as well as the consequences of the harm, which have to be severe," and the appeals officer in the second case stating that "to conclude that a danger exists, there must be more than a hypothetical threat. A threat is not hypothetical where it can reasonably be expected to result in harm, that is, in the context of Part II of the *Code*, to cause injury or illness to employees." Having considered all of the above, it is my opinion that the hazard identified under the first part of the test could be expected to be a serious threat to the life or health of the respondent.

[52] The third question under the test is whether "the threat to life or health will exist before the hazard or condition can be corrected or the activity altered." In this respect, the appellant has argued that the hazard can be corrected before it could become a danger. This may be generally exact in the sense that it is not all incidents/assaults that would reach the level where armed response would be indicated. However, where one considers the hazard identified, one needs to examine the question from the perspective of whether, if or when the seriousness of the incident reaches the level where armed response would be, under the SMM, the proper "defensive" or controlling action to take, such action could be brought to bear in time to avoid the materializing of the serious threat to life or health, whether it be by an actual warning shot, a targeted shot, or the deterrent effect of the post being manned. In my opinion, in the absence of armed post EM-14 being manned, the evidence is compelling that this cannot be achieved, keeping in mind here that a serious threat needs to be evaluated in terms of "reasonable expectation" of occurrence, which is more than hypothetical but less than certain. I do not propose to go through all the evidentiary elements that form part of this case to explain this conclusion. I will however point to the site visit by the undersigned that served to demonstrate the considerable limits on a potential/effective shot being taken by 3 Control, the extent of the blind spots and the time needed (one would rather use the term "delay") to actually put an armed officer in place at EM-14 to effectively intervene in the large portion of the courtyard not covered by EM-22 and 3 Control. As to the argument by the appellant that no evidence was presented that would demonstrate that the manning of EM-14 would be necessary to provide an efficient response to an assault, it is true that not all assaultive incidents will reach the level of seriousness that would require an armed intervention, thus accepting that likely in most instances the situation, whether an assault on inmate or one on staff can be controlled in the application of the graduated protocol actions in the SMM. However, should the incident reach the level of seriousness requiring such armed action, and I did earlier point out that this could occur in seconds or be of such a serious nature as to prevent a proper graduated application of the SMM, I do share the argument put forth by the respondent to the effect that under the SMM, "there exists no substitute for an immediate armed response when it is needed, that is, when officers (and inmates) are at risk of grievous bodily harm or death." It is thus my conclusion that the third question of the test must be answered in the affirmative in the situation at hand where EM-14 would not be manned.

[53] The final question to consider is whether the danger constitutes a normal condition of employment. As stated earlier, a "normal condition of employment", meaning one that would not make it possible to issue a corrective direction under subsection 145(2) of the *Code*, is a condition that is residual in nature and thus by that residual nature, is one that cannot be protected against or, to repeat what has been said time and time again at case law, "it is the danger that remains after the employer has taken all the necessary steps to eliminate, reduce or control the hazard, condition or activity." The appellant has argued quite forcibly that there has never been an assault on a correctional officer in the inner courtyard. However, whether this is exact or not, one must point out that it is well established in case law that the assessment of a hazard does not require that an event occurred. The test is simply reasonable expectation and this has been concluded above. The appellant has also argued quite forcibly that the employer has put numerous control measures in place to mitigate the risk of assault, in one form or another in the courtyard and I have no doubt that it has and that it is envisaged that they apply equally all through the institution where the need calls for such. In this respect, it has a policy or risk mitigation measure in place in a number of areas of the institution that envisages immediate armed intervention where needed. Where the courtyard and the gymnasium are concerned, the

evidence is that the employer has no intention of doing away with that possibility where the need arises. In this respect, it is interesting to note that where the gymnasium is in operation, therefore when there are inmates in the place, EM-14 is manned and yet, during the day, when inmates are in the courtyard at times regardless of duration, albeit not for any activity, although activity is not the criterion but presence is, and correctional officers may also be or be called in the courtyard for whatever purpose, the risk mitigating measure that is armed intervention does not receive equal application all through the courtyard, since with EM-14 not manned, a part of the place where inmates and correctional officers may find themselves under various circumstances cannot in those circumstances receive the immediacy of armed intervention like the remainder of the courtyard, all other conditions and policies being equal and the SMM being adhered to. In short then, the employer has deemed it necessary to man EM-22 and continue to man 3 Control to mitigate the risk that it recognizes as being real (one only needing to read the job description in this regard) for a large part of the courtyard, but argues that the other control measures that it has in place everywhere in the institution and in the whole courtyard are sufficient to mitigate the risk for the remainder of the courtyard, where armed intervention is not readily available when EM-14 is not manned. Ministerial Delegate Beattie found this situation to be short of the provision of all necessary steps to eliminate, reduce or control the hazard, since the latter arrived at a finding of danger and issued the direction under appeal, and this is also my conclusion. In this regard, I share the opinion expressed by the respondent in her submissions to the effect that "the only way that the appellant could argue that it has truly taken all steps to eliminate, reduce or control the hazard would be by manning EM-14 on weekdays between 07:00 and 16:00." My conclusion regarding this last question is that the situation raised by the refusal does not constitute a normal condition of employment.

[54] All this being said, having found that the condition identified as the non-manning of EM-14 could reasonably be expected to present a serious threat to the life or health of the refusing employee, that such threat would exist before the condition could be corrected, and finally that such cannot be considered a normal condition of employment, it is my conclusion that the appeal be denied.

[55] For these reasons, I confirm the direction issued by Ministerial Delegate Beattie on June 17, 2015, in the matter of the work refusal registered by the respondent on May 26, 2015.

Jean-Pierre Aubre
Appeals Officer